In The

Supreme Court of Virginia

RECORD NO. 091015

RONNIE EUGENE FULLWOOD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPENDIX

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ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in affirming the trial court's denial of Fullwood's motion to dismiss one of the two counts of possession with intent to distribute controlled substances within 1000 feet of school property. Appendix [hereinafter abbreviated "Ap."] 4-7, 71-77, 85-87, 101-102, 113-116, 125-128, 131-132. Appellant's counsel has been unable to find any appellate cases approving multiple indictments under Va. Code § 18.2-255.2 arising out of a single drug transaction in which multiple types of controlled substances are possessed within 1000 feet of school property. Appellant's counsel did a search in CaseFinder using the key word "18.2-255.2," and found 25 published and unpublished Virginia cases that mention that statute. Defense counsel examined all of the cases and did not find any case where the defendant challenged, or the appellate courts approved, the practice of indicting on multiple counts under Va. Code § 18.2-255.2 where multiple types of controlled substances are possessed during a single drug transaction. In fact, the usual practice would appear to treat the possession of multiple types of controlled substances as a single count under Va. Code § 18.2-255.2. See, e.g., Toliver v. Commonwealth, 38 Va. App. 27, 30, 561 S.E.2d 743, ___ (2002). The Court of Appeals' decision in the case at bar failed to adhere to the "fundamental rule of

statutory construction that penal statutes are to be strictly construed against the Commonwealth and in favor of a citizen's liberty." Harward v. Commonwealth, 229 Va. 363, 365, 330 S.E.2d 89 (1985). Such statutes may not be extended by implication; they must be applied to cases clearly described by the language used and the accused is entitled to the benefit of any reasonable doubt about the construction of a penal statute. Martin v. Commonwealth, 224 Va. 298, 300-01, 295 S.E.2d 890 (1982). Va. Code § 18.2-255.2 is a penal statute and, as such, "must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute." Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). Because Va. Code § 18.2-255.2 did not specifically provide that the offense should be charged separately for each controlled substance within 1000 feet of a school, the statute is necessarily ambiguous about whether multiple controlled substances possessed on a single occasion may be charged as multiple offenses. Because the Court of Appeals pointedly ignored those traditional principles of statutory construction in the case at bar, the judgment of the Court of Appeals should be reversed.

2. The Court of Appeals erred in affirming the trial court's denial of Fullwood's motion to strike both charges under Va. Code § 18.2-255.2,

where Fullwood was in a private apartment complex posted "No Trespassing" and thus not on "public property or any property open to public use," as required for a conviction under the statute. Ap. 74-75, 85-87, 101-102, 112-115.

STATEMENT OF THE CASE

On June 12, 2006, Ronnie Eugene Fullwood was indicted in the Newport News Circuit Court on one count of possession of cocaine with intent to distribute in violation of Va. Code § 18.2-248, one count of possession of marijuana with intent to distribute, two counts of possession with intent to distribute controlled substances within 1000 feet of school property in violation of Va. Code § 18.2-255.2, one count of possession of a firearm while simultaneously possessing drugs in violation of Va. Code § 18.2-308.4, and one count of trespassing in violation of Va. Code § 18.2-119. Ap. 1-2.

On June 25, 2007, Fullwood was tried in a bench trial before Judge Fisher. Immediately prior to trial, Fullwood moved to dismiss one of the two counts of possession with intent to distribute controlled substances within 1000 of school property on the grounds that that the possession of the controlled substances within 1000 feet of school property constituted a single offense and that it was double jeopardy to charge Fullwood twice,

once for possession of marijuana and once for possession of cocaine, for what was in reality a single prohibited transaction. Ap. 4-6. Judge Fisher denied the motion to dismiss. Ap. 6-7.

At the conclusion of the Commonwealth's case-in-chief and again at the conclusion of all the evidence, Fullwood moved to strike the evidence on multiple grounds. Ap. 71-82, 101-108. Judge Fisher granted the motion to strike the trespassing charge but otherwise denied the motions to strike and went on to find Fullwood guilty of the other five counts. Ap. 84-87, 111-116, 118-121.

At the sentencing hearing on September 14, 2007, Fullwood renewed his motion to strike one of the two counts of possession with intent to distribute controlled substances within 1000 feet of school property. Ap. 125-128. Judge Fisher again denied the motion. Ap. 131-132. Judge Fisher then proceeded to sentence Fullwood to five years in prison on the charge of possession of a firearm while simultaneously possessing controlled substances. Ap. 133. On the charge of possession of cocaine with intent to distribute, Judge Fisher sentenced Fullwood to fifteen years in prison, with fourteen years suspended for a period of fifteen years. App. 134. On the charge of possession of marijuana with intent to distribute, Judge Fisher sentenced Fullwood to ten years in prison, with nine years

suspended for a period of fifteen years. Ap. 134. On one count of possession with intent to distribute controlled substances within 1000 feet of a school (Indictment No. 58707), Judge Fisher sentenced Fullwood to five years in prison, all suspended for a period of fifteen years. App. 133, 136-138. On the other count of possession with intent to distribute controlled substances within 1000 feet of school property (Indictment No. 58708), which Judge Fisher ruled was a second offense subject to the statutory one-year mandatory minimum sentence, Judge Fisher sentenced Fullwood to five years in prison, with four years suspended for a period of fifteen years. App. 133, 139-141. In summary, Judge Fisher sentenced Fullwood to a total active sentence of eight years in prison. Ap. 133-135.

On September 14, 2007, Fullwood filed a notice of appeal to the Court of Appeals of Virginia. Ap. 142-143. On November 13, 2008, a Judge of the Court of Appeals granted Fullwood's petition for appeal. However, on May 12, 2009, the Court of Appeals affirmed the judgment of the trial court in a published opinion by Judge James W. Haley, Jr. Ap. 144-151. Fullwood filed a timely notice of appeal to the Supreme Court of Virginia. Ap. 152-153.

STATEMENT OF FACTS

On the afternoon of January 20, 2006, Ronnie Eugene Fullwood allegedly possessed cocaine and marijuana within 1000 feet of school property, with the intent to distribute the controlled substances. Newport News Police Sergeant J.V. Polak testified that he placed Fullwood under arrest for drug offenses at 5:43 p.m. and conducted a search incident to the arrest: "I told him we were going to search the car…. [As we were] walking from one side of the parking lot back over to that car … he told that there was a gun in the trunk." Ap. 25. "I immediately advised him of his Miranda warnings, and he told me that he understood. I also told him that I believed there was marijuana in the trunk, and he told me that there was about two ounces in the trunk." Ap. 25. "I got the key from his pants and opened up the trunk." Ap. 25. "Right inside the trunk, towards the right-hand side of the trunk, I recovered a black backpack. Inside that backpack, there's kind of a front pocket – not the main pocket but [in] the front pocket of it, I located one clear plastic bag containing multiple individually wrapped pieces of suspected crack cocaine." Ap. 26. "In the same pocket, I recovered two loose individually wrapped pieces of suspected crack cocaine. And at the bottom of the same pocket, I recovered a clear plastic bag of suspected crack cocaine, a larger chunk that had not been

packaged into smaller pieces. The same pocket also contained two clear plastic bags that contained individually wrapped bags of suspected marijuana." Ap. 29. "I told Mr. Fullwood that I had found crack inside the vehicle, and he told me that he had three pieces of crack … in his pocket. And as he said this, [the handcuffed Fullwood] kind of rolled up on his right hip and nodded towards his left pocket, left front trouser pocket. And I recovered three pieces of individually wrapped pieces of suspected crack cocaine." Ap. 29. "From his trouser pockets, I recovered $203 in U.S. currency. I also recovered a cellular telephone from his trouser pocket." Ap. 30-31. "Lying on top of everything else, on top of the spare tire in the trunk of the vehicle, I recovered a Ruger P95DC semiautomatic handgun with a magazine containing 15 rounds of live ammunition." Ap. 31. "When I asked him about the gun, he stated to me that he had a friend named C that had gotten in some trouble with the gun and had asked him to hold it for him." Ap. 46.

On cross examination, Sergeant Polak acknowledged that the Newsome Park apartment complex was private property with signs clearly marked "No Trespassing." Ap. 42. Sergeant Polak acknowledged that there was a letter on file with the Newport News Police Department, which authorized the police to enforce the "No Trespassing" policy. Ap. 42.

Officer J.S. Turlington testified that he measured the distance between Fullwood's car in the parking lot of the Newsome Park apartment complex and the Newsome Park Elementary School; he found that the car was about 575 feet away from the school. Ap. 50-51.

Detective Andy Matthews testified that he interviewed Fullwood at the Newport News Police Department on the evening of January 20, 2006, after first advising him of his Miranda rights. According to Detective Matthews, "The interview was conducted on that date from 6:36 to 7:40 in the evening at 2600 Washington Avenue, Seventh Floor, here in the City of Newport News." Ap. 53. "I approached Mr. Fullwood. He was already in custody. I asked him if he would like to be interviewed by me. Mr. Fullwood agreed. I then informed him of his legal rights according to Miranda, at 6:36. At that time, he waived his right to counsel and agreed to submit to an interview." Ap. 53. "The first portion [of the interview] we talked about … the firearm. I knew … from speaking with Sergeant Polak beforehand that a firearm was recovered. I asked Mr. Fullwood about the firearm. He replied to me he had received it on February 17th between two and three in the morning in the 4700 block of Rochester Court. It was given to him by an unknown person only known as C. C asked him to place this firearm in the rear of his vehicle." Ap. 53-54. "[Fullwood]

described [C] as being possibly Jamaican, with dreadlocks, and about 5'11". And he did not know his weight. He was adamant about [C] having the accent of a Jamaican." Ap. 54. "While the conversation continued, I asked Mr. Fullwood about the marijuana…. [Fullwood said] he met with C on January 19th at an unknown time, in the 4700 block of Rochester Court, at which time he claimed that C gave him the marijuana to sell, approximately two ounces of marijuana. And he had obtained this for approximately [$100]." Ap. 55. "I asked him about [the crack cocaine], at which point Mr. Fullwood stated that he found the crack in a metal electrical box in the 4800 block of Marshall Avenue. I'm familiar with this box. It's across the street from a Solo gas station. He said he found it there, took it from the electrical box, and put it in his backpack. Apparently, there was a backpack … with him when he was arrested. He said he was going to give it to his marijuana supplier for more marijuana. I asked him to clarify. I then stated, 'Are you going to exchange one for the other,' and he said yes. His reply then was, 'I wasn't going to sell it….' His reply was, 'Don't know what the fuck to do with it.'" Ap. 55-57.

Detective Matthews testified that Fullwood had in his possession 53 plastic bags containing approximately 7.5 grams of crack cocaine. Ap. 56-57, 117. Detective Matthews testified that the packaging and quantity of

the cocaine were "inconsistent with personal use." Ap. 57. Detective Matthews testified that Fullwood also had in his possession 40 plastic bags containing a total of 1.62 ounces (46.2 grams) of marijuana. Ap. 61-62.

QUESTIONS PRESENTED

1. Did the trial court err in denying Fullwood's motion to dismiss one of the two counts of possession with intent to distribute controlled substances within 1000 feet of school property? Ap. 4-7, 71-77, 85-87, 101-102, 113-116, 125-128, 131-132. (Assignment of Error 1).

2. Did the trial court err in denying Fullwood's motion to strike both charges under Va. Code § 18.2-255.2, where Fullwood was in a private apartment complex posted "No Trespassing" and thus not on "public property or any property open to public use," as required for a conviction under the statute? Ap. 74-75, 85-87, 101-102, 112-115. (Assignment of Error 2).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING FULLWOOD'S MOTION TO DISMISS ONE OF THE TWO COUNTS OF POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES WITHIN 1000 FEET OF SCHOOL PROPERTY.

Just prior to the start of trial, defense counsel moved to dismiss one of the two indictments alleging possession with intent to distribute controlled substances within 1000 feet of school property under Va. Code §

18.2-255.2. In support of his motion, defense counsel commented, "Your Honor, I noted that Mr. Fullwood is charged with two counts of possession of controlled substances within a thousand feet of school property…. Apparently, the Commonwealth is proceeding on the theory that one count is because there is alleged to have been cocaine in his possession and a second count is alleged because it was alleged that there was marijuana in his possession. And therefore they filed … two separate counts. I'm unaware of anything in the wording of the statute, 18.2-255.2, or anything in the case law that supports the notion that you can charge multiple counts based on different types of drugs. It appears to me from reading this statute [that] a fair interpretation of the statute (and the way I've always seen this statute interpreted in the past) [is that] it's based on the transaction, a single transaction, a single offense date, a single incident that alleged controlled substances were possessed within a thousand feet of a school. So it seems to me that regardless of what the evidence shows today, one of the counts ought to be dismissed." Ap. 4-5. "Your Honor, I would just note a general principle of statutory interpretation is that where a statute is ambiguous about a point … the accused is entitled to have the ambiguity resolved in his favor. That's a general principle of statutory interpretation. There is nothing in this statute that suggests that it ought to

be [charged] on a per substance basis. That statute just says if it's a controlled substance, imitation controlled substance, or marijuana, it's a charge. And if they were alleging different offense dates, that's one thing. But here it's the same transaction, same incident. It's a single charge. It's essentially a double jeopardy. I would note it's in effect a form of putting a person twice in … legal jeopardy for a single offense, a single transaction." Ap. 5-6.

The trial court denied the motion to dismiss one of the counts. Ap. 6-7.

At the conclusion of the Commonwealth's case-in-chief, defense counsel renewed his motion to dismiss: "Your Honor, at this point I would renew my objection regarding 18.2-255.2. We've heard the Commonwealth's evidence. There's a single … transaction or a single incident that we're talking about here, and yet we have two separate charges of dealing within a thousand feet of a school. There is no specific case law … the Commonwealth acknowledged [there is] no specific case law that says that it's proper to charge separate counts per substance. There's nothing in the statutory language itself, I would submit, that suggests that it's proper to charge per item of substance. The language speaks in terms of 'or'. It says if there's a controlled substance, 'any

controlled substance, imitation controlled substance, or marijuana,' then there's a charge, there is an offense. But … it doesn't say … we may charge separately per substance of these list of items. And certainly the fact is that when we're dealing with penal laws, those should be interpreted in the light most favorable to the defendant and against the power of the State. We can't simply assume that the statute allows for two separate offenses here. And I would submit it is a form of double jeopardy, two impositions or attempted impositions of a punishment for a single offense. I respectfully ask the Court to dismiss one of the indictments." Ap. 71-72. "I submit [there's] one transaction, one incident, one offense." Ap. 74.

The trial court again denied defense counsel's motion to dismiss. Ap. 74.

Va. Code § 18.2-255.2 provides as follows:

> **§ 18.2-255.2. Prohibiting the sale or manufacture of drugs on or near certain properties; penalty. —**
>
> A. It shall be unlawful for any person to manufacture, sell or distribute or possess with intent to sell, give or distribute any controlled substance, imitation controlled substance or marijuana while:
>
> (i) upon the property, including buildings and grounds, of any public or private elementary, secondary, or post secondary school, or any public or private two-year or four-year institution of higher education, or any clearly marked licensed child day center as defined in § 63.2-100;

(ii) upon public property or any property open to public use within 1,000 feet of the property described in clause (i);

(iii) on any school bus as defined in § 46.2-100;

(iv) upon a designated school bus stop, or upon either public property or any property open to public use which is within 1,000 feet of such school bus stop, during the time when school children are waiting to be picked up and transported to or are being dropped off from school or a school-sponsored activity;

(v) upon the property, including buildings and grounds, of any publicly owned or publicly operated recreation or community center facility or any public library; or

(vi) upon the property of any state facility as defined in § 37.2-100 or upon public property or property open to public use within 1,000 feet of such an institution. It is a violation of the provisions of this section if the person possessed the controlled substance, imitation controlled substance or marijuana on the property described in clauses (i) through (vi) of this subsection, regardless of where the person intended to sell, give or distribute the controlled substance, imitation controlled substance or marijuana. Nothing in this section shall prohibit the authorized distribution of controlled substances.

B. Violation of this section shall constitute a separate and distinct felony. Any person violating the provisions of this section shall, upon conviction, be imprisoned for a term of not less than one year nor more than five years and fined not more than $100,000. A second or subsequent conviction hereunder for an offense involving a controlled substance classified in Schedule I, II, or III of the Drug Control Act (§ 54.1-3400 et seq.) or more than one-half ounce of marijuana shall be punished by a mandatory minimum term of imprisonment of one year to be served consecutively with any other sentence. However, if such person proves that he sold such controlled substance or marijuana only as an accommodation to another individual and not with intent to profit thereby from any

> consideration received or expected nor to induce the recipient or intended recipient of the controlled substance or marijuana to use or become addicted to or dependent upon such controlled substance or marijuana, he shall be guilty of a Class 1 misdemeanor.
>
> C. If a person commits an act violating the provisions of this section, and the same act also violates another provision of law that provides for penalties greater than those provided for by this section, then nothing in this section shall prohibit or bar any prosecution or proceeding under that other provision of law or the imposition of any penalties provided for thereby.

Va. Code § 18.2-255.2.

Va. Code § 18.2-255.2 is a penal statute and, as such, "must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute." Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Hughes v. Commonwealth, 33 Va. App. 405, 408, 533 S.E.2d 649, ___ (2000). It is a fundamental rule of statutory construction that penal statutes are to be strictly construed against the Commonwealth and in favor of a citizen's liberty. Harward v. Commonwealth, 229 Va. 363, 365, 330 S.E.2d 89 (1985). Such statutes may not be extended by implication; they must be applied to cases clearly described by the language used and the accused is entitled to the benefit of any reasonable doubt about the construction of a penal statute. Martin v. Commonwealth, 224 Va. 298, 300-01, 295 S.E.2d 890 (1982).

Moreover, "words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest." Woolfolk v. Commonwealth, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994) (citing Huffman v. Kite, 198 Va. 196, 199, 93 S.E.2d 328, 331 (1956). "While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed." Weinberg v. Given, 252 Va. 221, 225-26, 476 S.E.2d 502, 504 (1996) (quoting Barr v. Town & Country Properties Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)); Smith v. Commonwealth, 26 Va. App. 620, 625, 496 S.E.2d 117, ___ (1998).

The Virginia Supreme Court has observed that the General Assembly's purpose in enacting Va. Code § 18.2-255.2 was to penalize drug transactions:

> The offense thus created reflects the General Assembly's concern about the aggravated nature of *drug transactions* involving children. The aggravating factor, *viz.*, a *drug transaction occurring within 1,000 feet of a school*, is incorporated into the offense. Implicit in that incorporation is the legislative finding, as a matter of substance and not of

> presumption, that such *transactions* are the cause of harm to children.

Commonwealth v. Burns, 240 Va. 171, 176, 395 S.E.2d 456, ___ (1990) (citations omitted) (emphasis added). Note that the focus of the legislature is on deterring *drug transactions*, not the possession of individual drugs per se. For example, the statute does not penalize the mere possession of controlled substances not intended for sale or distribution, even though the controlled substances are possessed within 1000 feet of a school. Likewise, the statute does not prohibit the possession of controlled substances within 1000 feet of a school where the drugs are intended to be sold or distributed elsewhere. See Toliver v. Commonwealth, 38 Va. App. 27, 33-34, 561 S.E.2d 743, ___ (2002).

"[W]hen analyzing a statute, we must assume that 'the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.'" Toliver v. Commonwealth, 38 Va. App. 27, 32-33, 561 S.E.2d 743, ___ (2002), (quoting Cousar v. Peoples Drug Store, 26 Va. App. 740, 745, 496 S.E.2d 670, 672 (1998)). Thus, if the legislature had intended a defendant to be charged under Va. Code § 18.2-255.2 on a per-substance basis, it could have indicated so. "We cannot add such additional protection to a statute .

. ., nor can we rewrite a statute with language not used by the legislature." Id.

This appears to be a case of first impression. Defense counsel has been unable to find any appellate cases approving multiple indictments under Va. Code § 18.2-255.2 arising out of a single drug transaction in which multiple types of controlled substances are possessed within 1000 feet of school property. Defense counsel did a search in CaseFinder using the key word "18.2-255.2," and found 25 published and unpublished Virginia cases that mention that statute. Defense counsel examined all of the cases and did not find any case where the defendant challenged, or the appellate courts approved, the practice of indicting on multiple counts under Va. Code § 18.2-255.2 where multiple types of controlled substances are possessed during a single drug transaction. In fact, the usual practice, in the experience of defense counsel, is to treat the possession of multiple types of controlled substances as a single count under Va. Code § 18.2-255.2. For example, in Toliver v. Commonwealth, 38 Va. App. 27, 30, 561 S.E.2d 743, ___ (2002), Tolliver was charged with one count under Va. Code § 18.2-255.2 where he possessed "one 'baggie corner' containing .053 grams of heroin, one plastic bag with 17 'baggie corners' containing .96 grams of heroin, one plastic bag with six 'baggie corners' containing

crack cocaine, and loose crack cocaine, totaling .60 grams." Id. at 30, 561 S.E.2d at ____. Appellant was able to find one instance, in the unpublished case of Martin v. Commonwealth, 04 Vap UNP 1484031 (2004), where multiple drugs possessed in a single incident gave rise to multiple indictments under Va. Code § 18.2-255.2. However, the defendant in that case failed to challenge the practice and in fact failed to make any contemporaneous objections, thereby causing all his arguments on appeal to be barred from consideration by Rule 5A:18. Thus, the unpublished Martin case cannot be said to approve or implicitly condone the proposition that a defendant may face multiple indictments under Va. Code § 18.2-255.2 arising out of a single drug transaction in which multiple drugs are held for distribution.

The double jeopardy prohibition of the United States Constitution protects against multiple punishments for the same offense. Woodfin v. Commonwealth, 236 Va. 89, 96, 372 S.E.2d 377, 381 (1988), cert. denied, 490 U.S. 1009 (1989); Fitzgerald v. Commonwealth, 11 Va. App. 625, 627, 401 S.E.2d 208, 210, aff'd on reh'g en banc, 13 Va. App. 281, 411 S.E.2d 228 (1991). The double jeopardy clauses of the United States and the Virginia constitutions (U.S. Const., amend. V, and Va. Const., art. I, § 8, respectively) embody three guarantees. They protect against (1) a second

prosecution for the same offense after acquittal, (2) a prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. Blythe v. Commonwealth, 222 Va. 722, 725, 284 S.E.2d 796, 797 (1981) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969), and Illinois v. Vitale, 447 U.S. 410, 415 (1980)).

Two offenses will be considered the same when (1) the two offenses are identical, (2) the former offense is lesser included in the subsequent offense, or (3) the subsequent offense is lesser included in the former offense. Martin v. Commonwealth, 221 Va. 720, 722, 273 S.E.2d 778, 780 (1981); see also Jones v. Commonwealth, 218 Va. 757, 759, 240 S.E.2d 658, 660, cert. denied, 435 U.S. 909, 439 U.S. 892 (1978). "[A]ppellate courts should undertake de novo review when determining whether the Fifth Amendment's Double Jeopardy Clause has been violated." United States v. Imngren, 98 F.3d 811 (4th Cir. 1996).

In the case at bar, Fullwood was convicted of two violations of Va. Code § 18.2-255.2, even though there was only a single occasion or transaction in which controlled substances were held for sale or distribution. He was, moreover, subjected to the mandatory penalty for a second offense, even though the controlled substances were possessed with intent to distribute during a single occasion or transaction. Appellant

submits that the trial court's application of the statute in the case at bar violated the guarantees against double jeopardy contained in the United States and Virginia constitutions. Moreover, the trial court's application of the statute failed to adhere to the fundamental rule of statutory construction that penal statutes are to be strictly construed against the Commonwealth and in favor of a citizen's liberty. In other words, the trial court applied the statute expansively to cover a case not clearly described by the language used and failed to afford to the accused the benefit of reasonable doubt about the construction of the penal statute. Accordingly, Fullwood's conviction for the purported "second offense" under Va. Code § 18.2-255.2 should be reversed and dismissed.

II. THE TRIAL COURT ERRED IN DENYING FULLWOOD'S MOTION TO STRIKE BOTH CHARGES UNDER VA. CODE § 18.2-255.2, WHERE FULLWOOD WAS IN A PRIVATE APARTMENT COMPLEX POSTED "NO TRESPASSING" AND THUS NOT ON "PUBLIC PROPERTY OR ANY PROPERTY OPEN TO PUBLIC USE," AS REQUIRED FOR A CONVICTION UNDER THE STATUTE.

At the conclusion of the Commonwealth's case-in-chief and again at the conclusion of all the evidence, defense counsel moved to strike both counts under Va. Code § 18.2-255.2 because the offenses did not occur on "public property or any property open to public use." Ap. 74-75, 101-102. Defense counsel observed at the close of the Commonwealth's case-in-chief, "The statute says, 'It shall be unlawful for any person to manufacture,

sell, or distribute, or possess with the intent to sell, give, or distribute any controlled substance, imitation controlled substance, or marijuana' while upon school property – we don't have that – or upon public property – we don't have that, it's private property that we're talking about – 'or property open to public use within 1,000 feet of the property described in clause (I),' which describes schools. Your Honor, the evidence is that this property is private property. It's not public property. It's not open to [whomever] in the public wants to come in and use that property. It's not open to public use. It's private property, clearly posted, 'No Trespassing.' It has a letter on file with the City to enforce [the trespassing law] against people trying to make use of this property as public use property. It's not allowed. It's not within the parameters of the statute. The evidence that's been described today simply doesn't come within the terms of the statute, and I would move to dismiss both these counts." Ap. 74-75.

The trial court, after recessing to chambers to do a bit of research, denied the motion to strike. Ap. 85-87. In denying the motion to strike, the trial court cited the cases of Smith v. Commonwealth, 26 Va. App. 620, 626, 496 S.E.2d 117, ___ (1998) and Commonwealth v. Capers, 4 Cir. CR99003399, 57 Va. Cir. 79 (2001). In Smith, the Court of Appeals ruled

that the parking lot of a convenience store was "property open to public use":

> Because the meaning of "property open to public use" is not simply limited to public property, we look to the intent of the legislature to define those areas where the statute does apply. It is no great difficulty to divine the intention of the General Assembly when it passed Code § 18.2-255.2. It has identified the evil to society that drug use and distribution represent. This drug culture is particularly destructive to the young and impressionable members of our society. In an attempt to contain this modern plague, both the General Assembly and Congress have increased the penalties accruing to one who sells narcotics "'[i]n such areas, where children congregate in large numbers before, during, and after school sessions.'" Commonwealth v. Burns, 240 Va. 171, 178, 395 S.E.2d 456, 459 (1990) [citations omitted].
>
> The convenience store outside of which defendant sold his cocaine is the type of place where school age children congregate. It is located directly across the street from a high school in the City of Virginia Beach. There is no indication in the record that that location was blocked, closed or in any way inaccessible to the public. Indeed, the record suggests that the participants to the drug transaction at issue had full access to the property on several occasions with no interruption from the owners of the establishment. Under these circumstances we hold that this convenience store parking lot was "property open to public use."

Smith v. Commonwealth, 26 Va. App. 620, 626, 496 S.E.2d 117, ___ (1998).

In Commonwealth v. Capers, 4 Cir. CR99003399, 57 Va. Cir. 79 (2001), Judge Lydia Calvert Taylor of the Norfolk Circuit Court ruled that

the interior of a house within 1,000 feet of a school was not "property open to public use":

> The Court finds that, in this context, that while possession of drugs inside a house is illegal, the interior of the house, although it may be located within 1,000 feet of school property, is not what is meant by "property open to public use." Therefore, the Court finds the evidence insufficient on the second firearm charge and the drugs within 1,000 feet of a school charge and dismisses the two charges.

Commonwealth v. Capers, 4 Cir. CR99003399, 57 Va. Cir. 79 (2001).

At the close of all the evidence, defense counsel renewed the motion to strike the two indictments under Va. Code § 18.2-255.2: "There's no evidence presented by the Commonwealth to suggest that this is an area open to public use. In fact … there's 'No Trespassing' signs. I would submit the evidence would seem to suggest that the owners of the property were trying to interfere with the public – the general public just coming in onto the private premises to make use of the property, the sort of considerations that were referred to in the case that you quoted earlier [Smith v. Commonwealth, 26 Va. App. 620, 626, 496 S.E.2d 117, ___ (1998)]. And so it's an area not open to public use. There is a reason for [the "open to public use" restriction in] the statute. I submit that the defendant is entitled to a construction that I suggest is appropriate….

When there's an ambiguity in the statute, it ought to be resolved in the defendant's favor." Ap. 101-102.

The trial court again denied defense counsel's motion to strike. Ap. 112-115, 119, 121. Appellant submits that the trial court erred in doing so, because it applied the statute expansively to cover a case not clearly described by the language used and failed to afford to the accused the benefit of reasonable doubt about the construction of the penal statute. Accordingly, both Fullwood's convictions under Va. Code § 18.2-255.2 should be set aside.

CONCLUSION

For the reasons urged herein, it is requested that this Court reverse the judgment of the Court of Appeals and the trial court below.

RONNIE EUGENE FULLWOOD

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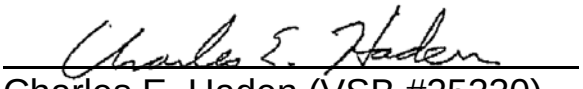
CERTIFICATE

I, Charles E. Haden, certify this 28th day of September, 2009 that: 1) three paper copies of the foregoing Brief of Appellant and Appendix were sent via U.S. Mail, postage prepaid, to Jennifer C. Williamson, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, 900 East Main Street, Richmond, VA 23219 (telephone: 804-786-2071; facsimile: 804-371-0151); 2) fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix were hand-filed in the Clerk's Office of the Supreme Court of Virginia, 100 N. Ninth Street, Richmond, VA 23219-2334; 3) I am a court-appointed attorney; 4) I request oral argument; and 5) I have complied with Rule 5:26(d).



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